

January 31, 2013

*Via E-filing and Facsimile*

The Honorable Barbara R. Kapnick  
Supreme Court of the State of New York  
60 Centre Street  
New York, New York 10007

**Re: *In re the application of The Bank of New York Mellon***  
**(Index No. 651786/2011)**

Dear Justice Kapnick:

Enclosed for the Court's consideration is the Steering Committee's proposed Amended Scheduling Order. The Petitioners recently submitted a competing proposed order and purported to submit a copy the Steering Committee's proposed order as well. (Ex. B to Petitioners' January 30, 2013 Letter.) The proposed order in Petitioners' Exhibit B was a previous draft that did not account for that parties' subsequent meet and confer session. We respectfully request that the Court disregard Exhibit B to Petitioners' letter as an inaccurate representation of the Steering Committee's position.

Additionally, Petitioners submitted a Stipulation of The Parties and Proposed Order ("Stipulation"). As the Steering Committee previously informed opposing counsel, the Stipulation has yet to be circulated to the full group of Intervenor-Respondents and potential Objectors ("Respondents"). Once the Court enters an amended scheduling order the Stipulation will be revised accordingly, circulated to the full group for review, and submitted properly to the Court. Until then, we respectfully request that Your Honor enter only an amended scheduling order.

The Steering Committee believes that the enclosed proposed scheduling order comports with Your Honor's comments and directions during the January 18 conference call. The Steering Committee's proposed order differs from the Petitioners' proposed order in two substantive ways, and we respectfully request that Your Honor enter the Steering Committee's proposed order.

**1. Expert Reports**

The Steering Committee's proposed order makes clear that Respondents will serve initial expert reports on February 28, Petitioners will serve *rebuttal* reports on March 14, and Respondents will serve *reply* reports on March 28. This change in the Scheduling Order was made at the Court's clear direction that the Petitioners did not need to serve initial expert reports,



January 31, 2013

Page 2

but rather only needed to see and respond to expert reports served by Respondents. In fact, the Trustee has essentially already identified multiple experts on whose opinions it relied in entering the settlement—namely, Brian Lin, Professor Barry Adler, Professor Robert Daines, and Capstone Valuation Services. Rather than adhere to the Court’s directive, the scheduling order proposed by the Petitioners states that on March 14 “Petitioners will serve expert reports,” thereby granting themselves the right to serve one or more initial reports on entirely new subject areas, rather than simply rebutting Respondents’ experts.

The Steering Committee opposes the Petitioners’ request to introduce new expert reports or new topics on March 14 that go beyond rebutting Respondents’ initial expert reports. The Court provided clear direction to the parties during the January 18, 2013 teleconference that expert reports should follow an initial report-rebuttal-reply sequence. There is no need for Petitioners to proffer expert reports beyond those that (1) are already in the record or (2) will be offered to rebut Respondents’ expert reports.

If Petitioners are allowed to introduce new subject areas of expert opinion on March 14, the two weeks provided for Respondents to reply would be grossly inadequate given that new rebuttal expert(s) would need to be found, retained, and have time to reach and produce an opinion. Petitioners would also receive a clear and blatantly unfair advantage in having two additional weeks to develop their initial expert reports *after* Respondents make initial disclosures. The Steering Committee does not believe this is what the Court intended during the January 18 teleconference, and therefore respectfully requests that the Petitioners’ descriptions of the expert disclosure deadlines be rejected.<sup>1</sup>

## **2. Final Briefing Sequence**

We submit that another change be made to the current Scheduling Order (Doc. No. 363). The final briefing schedule currently contemplates all parties filing briefs in support or opposition to the settlement on the same day, all parties then simultaneously filing response briefs in support or opposition, and all parties *again* simultaneously filing reply briefs in support or opposition to the settlement. This process would result in the Court being inundated with at least nine substantial briefs before the final hearing (three each for BNYM, the Inside Institutional Investors, and any Steering Committee objection) along with potentially three more from each and every objector filing separately. The Petitioners then propose that the hearing

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<sup>1</sup> If the Court does allow Petitioners to submit expert reports that go beyond directly rebutting Respondents’ experts, then the Steering Committee requests the Court set only two dates for expert disclosures – an initial disclosure date for all parties of February 28, and a rebuttal date for all parties of March 28. This would provide thirty days for all parties between initial and rebuttal reports, a more manageable timeframe.



January 31, 2013

Page 3

begin a mere 12 days after this briefing process closes. This proposal is not fair to the Court or anyone else seeking a full and fair review of the proposed settlement.<sup>2</sup>

The Steering Committee therefore proposes that the final briefing be sequenced in the same way that the Court directed expert reports be served. Namely, that Respondents will file any briefs in opposition to the proposed settlement, then Petitioners file a response to any objections, and Respondents then file replies.

Petitioners have already filed statements in support of the settlement. *See* BNYM's Article 77 Petition (Doc. Nos. 1, 12); BNYM's Consolidated Responses to Objections (filed 10/31/11 at Fed. Doc. No. 126); Inside Institutional Investors' Statement in Support of the settlement (filed 10/31/11 at Fed. Doc. No. 124). Additionally, Petitioners have always had access to the witnesses and factual information produced during discovery. There is simply no reason why Petitioners need to file yet another set of papers in support of the settlement, other than to respond to any objections that may be filed.

For the reasons set forth above, we ask that Your Honor enter the enclosed Steering Committee's Proposed Amended Scheduling Order. Thank you for your time and consideration.

Respectfully submitted,

Daniel M. Reilly

Enclosure

cc: Counsel of record (via ECF)

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<sup>2</sup> The Steering Committee's proposed order also differs in that it proposes May 30 as the start date for the hearing rather than May 20 as a start date. Even an additional 10 days will make a difference for the Court since under the compressed schedule significant briefing will be submitted shortly before the hearing, but we agree with the Petitioners that we need not take up the Court's time to debate this issue. We ask that Your Honor select a start date most convenient for the Court.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Assigned to: Kapnick, J.

**[PROPOSED]  
AMENDED  
SCHEDULING  
ORDER**

Upon hearing oral argument on January 18, 2013 with respect to issues of expert disclosures and scheduling, the Court hereby orders that this matter will proceed on the following schedule, unless otherwise ordered by the Court upon application of any of the parties:

**February 28, 2013:** Respondents shall produce initial expert reports.

**March 14, 2013:** Petitioners shall produce their expert reports in rebuttal to Respondents' initial expert reports.

**March 28, 2013:** Respondents shall produce their expert reports in reply to Petitioners' rebuttal reports.

**April 16, 2013:** (A) Briefs in opposition to the Settlement shall be filed, and (B) each intervenor-respondent and/or objector shall notify the Trustee and the Court (i) whether they object to the Settlement; and (ii) whether they intend to present evidence or testimony in opposition to the Settlement at the final hearing. Discovery of intervenor-respondents and/or objectors who give notice of objections pursuant to section (B)(i) hereof shall commence.

**April 30, 2013:** Responses in support of the Settlement shall be filed.

**May 14, 2013:** Replies in opposition to the Settlement shall be filed.

**May 30, 2013:** Final hearing on the Settlement begins.

All parties reserve all rights and objections to all discovery that is sought.

ENTER

Dated: \_\_\_\_\_, 2013

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J.S.C.